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Supreme Court of the United States

OCTOBER TERM, 1901.

FOK YOUNG YO,
Appellant,
vs.
THE UNITED STATES.
No. 478.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

LEE GON YUNG,
Appellant,
vs.
THE UNITED STATES.
No. 482.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

REPLY BRIEF OF APPELLANTS.

MAXWELL EVARTS,
Counsel for Appellants.

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Reply of Appellants to Appendix to Government's Brief.

On page 2 of the appendix to the brief for the United States, which has been filed since the argument of these cases, it is stated that "the production of a

through ticket is one item of competent evidence and other evidence is contemplated." It is to be noticed that the character of this "other evidence" is not stated by the Attorney-General, and no suggestion has ever been made either at the argument or in the briefs as to what this additional evidence should be. The regulation is simply to the effect that the applicant shall produce a through ticket "and such other proof as he (or she) may be able to adduce." We most earnestly insist that this additional proof is to be produced only in case the applicant *may be able* to do so. There is nothing obligatory upon him to produce further evidence, and the regulation does not require that the right of transit should be denied because of the failure to do so. As it seems to us, this additional clause was inserted to cover the case of a man who, by reason of accident or other cause, had no through ticket, but might be able by other means, to satisfy the collector that a *bona fide* transit only was intended.

Further on in this same paragraph the Attorney General says:

> "Certainly in the investigation of this subject the examiner may obtain and consider all other evidence, and is not restricted to that which the Chinaman may adduce in his own behalf."

While we do not wish to be technical in our construction of the regulation of December 8, 1900, yet, as we understand it, there is no obligation placed

upon the collector to take any steps whatever in the matter. The burden is placed upon the applicant. It is his business to satisfy the collector that a *bona fide* transit only is intended. If he fails to do so, then the duty of the collector is simply to order his deportation. There is nothing in the regulation which requires the Collector to affirmatively seek for evidence upon the subject and to show an absence of good faith. If he is not satisfied that the applicant intends to make a *bona fide* transit, then it is not for him to make a case in support of his conclusion, but the burden of showing good faith is upon the applicant alone, and he is required to satisfy the Collector in that regard. If, in the opinion of the applicant, the Collector is not justified in his conclusion that a *bona fide* transit is not intended, and has no basis for such determination, then we say, that the Collector cannot arbitrarily deny the right of transit, that in the present state of the law his decision is not final, and that in such a situation a question is presented for review by the Federal Court on a writ of *habeas corpus*.

We certainly insist that, if there is any obligation upon the Collector to prepare and made a case against the applicant, then there is no regulation requiring and no authority given to him to search the person of the applicant or to break open his baggage. We say that this is constantly done, and it is so stated by the record to have occurred in both of these cases. As the Government has departed in its brief, argument and appendix to its brief, so far from the

record in these cases, we think it is not improper to say that, although in these two particular cases, there may have been no papers or letters found upon the person of the appellants, or in their baggage, yet in the cases which are awaiting the decision of these two cases, the Government did, by breaking open the baggage of the applicants and by searching their person, discover many papers and letters which were perfectly innocent in themselves. The Chinese inspector, however, decided that the mere fact that the Chinaman had a letter in his possession, no matter to whom it was addressed or what it was about, was to be considered evidence of an intention not to make a *bona fide* transit. It was sufficient that the applicant had a letter in his possession. The innocent character of that letter was never for a moment considered, and in the application to the Secretary of the Treasury, it was explained to him that the letters which the Government had referred to in the records of the cases against the Chinamen were none of them of a character which in any way tended to convict the applicant of an intention not to make a *bona fide* transit across the country, and that they equally failed to show any intention whatever on the part of the applicant of returning to this country across the border of Mexico. Reference is made to the finding by the Government of letters on the persons of the applicants for the purpose of showing that the Government does as a matter of fact search the persons of these applicants and does break open their baggage in order to make out a

case showing that the applicant did not intend to make a *bona fide* transit across the territory of the United States. If the doctrine of *uberrima fides* is to be observed in the construction of a treaty, certainly it should be in its application. The letters found were themselves no evidence of any want of good faith, and the construction put upon the mere fact of the finding of the letters was simply a part of the general plan of the Chinese Bureau to prohibit the crossing of our country by Chinamen when their destination was in a country contiguous or adjacent to the United States.

It is now proposed that a law should be passed by Congress giving to the Chinese Inspector the right to search the persons of the applicants, and to open their baggage (see Appendix).

In the original brief of the appellants and in the argument it was stated that the Chinese Inspector, upon mere suspicion alone, prevented the appellants and the other Chinamen, who are now awaiting the decision of these cases, from crossing the territory of this country. This statement was made from what was known to be the fact, as it appeared in the cases before the Secretary of the Treasury, which he was asked to review. It was given in many of them by the Chinese Inspector as a reason for refusing the privilege of transit, that he "suspected" that the applicant might thereafter undertake to return across the boundary of the United States.

It is submitted that a mere suspicion is no reason for refusing to the Chinaman the right stipulated in

the treaty between the two countries, and that certainly it is not enough when there is no fact upon which such suspicion is founded, except that the applicant is a Chinaman and is going to a country adjacent to this.

It is sought by the Government in its brief and argument to make something out of the fact that, upon reaching Mexico, the Chinamen are all unshipped in squads. The argument which, it is desired, should be drawn from this statement, seems hardly to be justified, as it is common knowledge that the Chinamen are taken by the transportation companies across the United States under an armed guard, in box cars, and that the duty of the transportation company is entirely concluded when the Chinamen have been taken out of the United States and into Mexico. Of course the transportation company, having taken the Chinamen out of the United States and having fully complied with its duty, then liberates the Chinamen. There is no obligation imposed upon the transportation company of seeing each applicant through to his final destination—in the City of Mexico, or in Central America, or in Cuba or in Porto Rico. Its duty is fulfilled when it takes the Chinamen through and out of the United States, and as the Chinamen are taken through the country in squads, they are necessarily liberated in squads as soon as they are placed upon foreign territory and out of the United States. They then go forward to their respective destinations.

II.

The Government, on page 3 of the appendix to its brief, has undertaken to answer what was said in the oral reply to the argument of the Attorney-General, that it was true that the percentage of applicants refused the privilege of transit was less than it had been, and that this diminution was possibly due to the fact that the matter had been taken up with the Treasury Department in November last. The argument of the Government in answer to this statement would seem to be a complete corroboration of it.

From 1883 to 1901 there were 37,688 applications for transit, *and not one was refused* (Government's Appendix, p. 3).

Suddenly in the last six months of 1901 the refusals grew from not one for eighteen years to nearly twenty per cent. of the applicants in the last six months of 1901, and almost that entire twenty per cent. occurred prior to the matter being taken up by the Treasury Department in November, as since that time the refusal of the right of transit has been very small.

It is certainly remarkable that this right of transit should never be refused in a single instance for eighteen years, and then should suddenly rise to the large proportion of twenty per cent. of the applications in the last six months of 1901, especially when you consider that the refusal of the privilege of transit was confined to three or four

months of such period. It is possibly a mere coincidence that this sudden zeal in denying the privilege of transit occurred at a time when the agitation was first beginning in California, for the purpose of creating a renewed feeling of hostility to the Chinese, in order to enact a further and more severe law excluding them from our country.

The Attorney-General in his brief has said that it was inaccurate to say upon the argument in behalf of the appellant that the diminution in the refusal of the privilege of transit was due to the fact that "the Government is conscious of having gone too far." If it was so stated on the oral argument, it would seem a far more accurate conclusion than that of the Government in its brief, when it says that "there are less refusals at the moment, because the necessary lesson has been taught and the fraudulent applications have largely ceased." If the number of applications at San Francisco for the privilege of transit has in any way diminished, since in August and September the greater number of applicants were refused the privilege, the reason for such diminution is that the transportation companies were unable to give an absolute assurance to a Chinaman purchasing a through ticket to a foreign country via the United States that this country would fulfill the stipulation of the treaty of 1894, and permit him to cross its territory in the course of his journey.

Certainly it is somewhat extraordinary that this decrease in the number of applicants, to whom the privilege was denied, followed almost immediately upon

the question being taken up in the Treasury Department.

III.

It is stated in the appendix to the Government's brief that the Chinaman has no right of appeal to the Secretary of the Treasury from the decision of the Collector denying to him the privilege of transit.

At page 4 of the brief it is said, "But the Government does deny * * * that the Chinaman has the right of transit or the *right to appeal.*" Again, on page 6 of the brief there is a quotation from the letter of the Secretary of the Treasury to the Collector of Customs at San Francisco, dated November 18, 1901, in which it is stated that the Collector "as the last resort of Chinese seeking the privilege of transit," should give attention to the cases of Chinamen applying for such privilege. In other words, the Secretary of the Treasury wrote to the Collector that his decision upon this question was final, and could not be reviewed by the Secretary of the Treasury.

This letter of November 18, 1901, we have never seen nor heard of before, but it certainly sustains the statement to the Court on the oral argument that the cases which were appealed to the Secretary of the Treasury, and which did not contain one word of the Chinaman's case, but consisted only of evidence taken by the Government in a secret proceeding, and with

the power of searching the applicant's person and breaking open his baggage, would have all been reversed if an opportunity had been given to bring them up for review and properly present them. The Secretary of the Treasury frankly said in this letter to the Collector that "*the department is impressed with the apparent bona fides of the representations of certain of the appellants.*" If the department was impressed without a due presentation of the cases, and upon the mere written representation of the Chinese Inspector that the right of transit should be refused, then the appellants state more confidently than ever before that, if an opportunity to fully and fairly present these cases had been given, not in a single instance would the privilege of transit have been refused.

Prior to the appeal to the Secretary of the Treasury, the Collector was persuaded to hear the facts in one case, and, upon the presentation to him of the Government's case alone, it was insisted by him that the man should be allowed to proceed upon his journey across our country. This was the only case in which a hearing was granted by the Collector. In view of the large number of cases in which it was claimed that the right of transit had been improperly refused, it seemed to him that the matter should be taken up with the Treasury Department in order to get some definite decision governing the subject, as he had not the time and opportunity to give a separate hearing upon the merits to each one of the cases.

IV.

The position of the appellants in this case is that there is no statute, treaty or regulation which makes final the decision of the Collector when adverse to the right of transit. They simply ask for an opportunity to present their case. They do not object to the provision of the regulation (if it is a Governmental regulation, which they deny) that the Collector should be satisfied as to the *bona fides* of the transit intended, but they do object to the Collector determining that such transit was not intended in good faith, upon no evidence tending in any way to support such conclusion. The regulation that he should be satisfied of the *bona fides* of the transit intended does not mean that he should be dissatisfied, without any evidence or reason for such dissatisfaction. When such a case is presented the appellants insist that it is proper for the Court to examine into it, on a writ of *habeas corpus*, and determine for itself whether, in its opinion, the privilege of transit was rightly refused. The appellants are not asking for any favor, nor are they seeking for an opportunity to escape from or avoid the provisions of the Exclusion Act, but merely ask the Court for an opportunity to state their case. All that they desire is to be heard, and certainly no harm can come to the United States by granting their request.

The real questions in this case are:

FIRST. Whether a department of the Government of the United States can initiate, create and execute on its

own motion a policy which is carried out as if it were the policy of the whole people of the United States as represented by Congress?

The statements contained in the appendix to the brief of the Government, show that this has been done in the present case. For eighteen years it has been the policy of the United States to grant the privilege of transit to every applicant. Suddenly, without any authorization from Congress, or without any evidence that it is the intention of the United States to depart from that policy, the Chinese Inspector without warning denies to one-fifth of all the applicants the privilege of transit. He claims to have the power to do so from a regulation of the Treasury Department unauthorized by statute or by Treaty, and we respectfully submit that the question of whether a few Chinamen may find their way accross the southern boundary of this country in violation of the Exclusion Acts is of small moment compared with the establishment of the principle, that a Chinese Inspector may of his own motion, inaugurate and execute a policy towards a friendly country, which can hardly be agreeable to the latter, without any opportunity upon the part of the Courts of the United States or of his superior officer, the Secretary of the Treasury, to review what he has done.

SECOND. The Government insists that the Secretary of the Treasury has the power to place, by regulation, the decision of his inferior officers beyond the review of the courts. This is certainly a novel and radical

proposition, and we respectfully submit that, whether the Treasury Department can make the decisions of its inferior officers final and not subject to an appeal therefrom, either to the courts or to the Secretary of the Treasury, is a question which will bear most careful consideration.

V.

We have not undertaken to say that the policy initiated and created by the Chinese Bureau of the Treasury Department is not an advisable one. Whether it is desirable to search the person and baggage of Chinamen applying for the privilege of transit across our territory, and whether it is advisable that a determination by the Collector adverse to their application should be final, is something for Congress to determine. Our position is, that in the absence of any such determination by Congress, it is not for the Collector to act on his own motion. We insist that before the Collector can execute this policy, which he thinks desirable, he must be authorized to do so by an Act of Congress. The answer to this argument is not plain, and its force has been felt by the Treasury Department, for by Section 27 of the bill introduced in the House of Representatives, on December 6, 1901, by Mr. Kahn (after a hearing of these cases in the Treasury Department) it is provided:

"That any Chinese person or person of Chinese descent, who shall seek the privilege of transit, if by land, through and across any part of the United States or its territories, or by water carriage, through or to and from any port thereof * * * *shall submit to an examination of his person and baggage* * * * and the refusal to grant permission to any such person to exercise such privilege by the officer designated to consider and determine applications for such permission at any port of arrival *shall be final.*"

MAXWELL EVARTS,
Counsel for Appellants.

APPENDIX.

SECTION 27 OF BILL INTRODUCED BY MR. KAHN IN THE HOUSE OF REPRESENTATIVES, DECEMBER 6, 1901.

SEC. 27. That any Chinese person, or person of Chinese descent, who shall seek the privilege of transit, either by land through and across any part of the United States or its territory, or by water carriage through or to and from any part thereof, or through and across any of the waters under the jurisdiction of the United States, as provided in Article Three of the Convention of December eighth, eighteen hundred and ninety-four, hereinbefore referred to, *shall submit to an examination of his person and baggage*, and to such investigation as may be deemed necessary by the officers charged with the enforcement of this act, and shall establish to the satisfaction of such officers that he intends solely to proceed immediately to an ultimate destination beyond the United States or its territory; that he has the assurance of employment or occupation at such ultimate destination, and that he does not intend to make use of said privilege as means of obtaining unlawful entrance to the United States or its territory; and such Chinese person, or person of Chinese descent, shall comply in all respects with

the rules and regulations in regard to such persons seeking permission to exercise said privilege which may be issued from time to time as hereinbefore provided, and *a refusal to grant permission to any such person to exercise said privilege by the officer designated to consider and determine applications for such permission at any port of arrival shall be final.*